

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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Revision of Rules and Policies for the)
Direct Broadcast Satellite & Services)
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IB Docket No. 95-168

PP Docket No. 93-253

NYNEX REPLY COMMENTS

NYNEX Corporation, on behalf of its subsidiaries (collectively "NYNEX"), hereby submits its Reply Comments addressing the Comments of other parties filed in response to the Notice of Proposed Rulemaking ("NPRM") in this proceeding.

NYNEX focused its Comments on the proposed new rules restricting the relationships Direct Broadcast Satellite ("DBS") service providers can establish with other Multichannel Video Programming Distributors ("MVPDs"). We pointed out that the only MVPDs with any market power, now or in the foreseeable future, are the incumbent Cable Companies ("CableCos") (Comments 2-4). We also pointed out that DBS relationships with other MVPDs (e.g., joint marketing arrangements), while as yet undefined, may be necessary to support a strong second competitor to the incumbent CableCos (Comments 5-7). Therefore, any rules proscribing potential relationships between DBS providers and other MVPDs should be limited to DBS relationships with CableCos. As discussed in Section I below, a review of the Comments of others supports this position.

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In addition, Commenters have sharply focused on the “Program Access” issues raised in the NPRM, including regulations that: (a) would extend program access/program carriage regulations to DBS providers affiliated with any MVPD or video programmer; (b) would require that any “wholesale” DBS function provided to affiliated CableCos be provided to other MVPDs on a nondiscriminatory basis. As discussed in Section II below, only the proposed regulations governing wholesale DBS are required.

I. THERE IS NO BASIS FOR APPLYING NEW MARKETING LIMITATIONS TO DBS PROVIDERS WITHOUT CABLECO AFFILIATIONS

The Commission has asked for comments on certain “Marketing Limitations” that it is proposing to apply to all DBS operators affiliated with non-DBS MVPDs (NPRM at paras. 55-56).¹ In each case the proposed prohibition and restrictions would be applied to all MVPDs, irrespective of their market power. By failing to observe the distinction between incumbent MVPDs with market power and fledgling providers seeking to loosen the incumbent’s stranglehold, the proposed rules risk impeding necessary competitive activities.

A. There Is No Affirmative Reason To Apply New Marketing Limitations To MVPDs (Including DBS Providers) Lacking Market Power

NYNEX earlier pointed out that the only MVPDs with market power are the incumbent CableCos. All other current and prospective video services providers, indiscriminately grouped together with CableCos as MVPDs, have minimal or no market share.² Further, they

¹ These proposals would extend Tempo II conditions to all MVPDs and would prohibit the provision of transponder capacity to entities which enter into exclusive marketing agreements governing the distribution of DBS services in that MVPD’s service area. Elsewhere, another proposal would limit MVPD-affiliated DBS operators to one orbital location (NPRM at para. 40).

² The Commission’s 1994 Cable Competition Report found that, “cable television remains the dominant medium for providing consumers with multichannel video programming. Most local markets for the distribution of multichannel video programming are highly concentrated, and for most consumers, cable television is the only provider of multichannel video programming. *** Moreover, providers using alternative technologies have not

face substantial cost and other barriers to becoming effective competitors, and they must enter the competition without the expectation of securing the monopoly rents that earlier propelled the CableCos themselves.

None of the twenty-eight entities that responded to the NPRM argued to the contrary. Indeed, the Department of Justice ("DOJ") --- the federal governmental entity charged with assessing market power -- details at length why only the incumbent CableCos have such power. And based on its assessment that "monopoly cable systems continue to possess substantial market power in the MVPD market" DOJ recommends that "the Commission should seek to insure that the development of potentially competitive distribution technologies will not be impeded, either by regulatory policy or by the actions of monopoly cable systems."³

DOJ's analysis is consistent with the Commission's own findings in its 1994 Competition Report as to CableCo market share and the relative infancy of other competitive entrants. As Professor Hausman has found:

"[e]conomists, government regulators, and Congress have concluded that cable operators have market power and have engaged in a number of anti-competitive actions. In particular, [private and government economists, government enforcement authorities and Congress] have determined that cable operators' prices to consumers have reflected the exercise of market power - - the ability to price above competitive levels for extended periods of time."⁴

yet reached the subscribership levels necessary for the Commission to find the existence of vigorous rivalry in the market for multichannel video distribution." 1994 Cable Competition Report, 9 FCC Rcd. 7442 (1994).

³ DOJ at 2-3. Importantly, American Satellite Network details numerous ways in which CableCos can also use their market power and affiliations to impair the competitive efforts of independent programmers (ASN at 2-8).

⁴ Statement of Professor Jerry A. Hausman, attached to Direct TV Comments at para. 9.

On the other hand, it is noteworthy that the comments report no actual circumstances of anti-competitive conduct or even allege such conduct among non-cable MVPDs, either standing alone or in concert with DBS providers.

Instead, Commenters focus on the current rules which govern certain relationships between CableCo-Affiliated DBS providers and CableCos. Here, non-CableCo affiliated DBS providers argue that current restrictions on CableCo conduct are necessary and should be at least retained, if not expanded.⁵ Conversely, CableCos and affiliated DBS providers argue that at most the Tempo II rules should be retained, but that generally such restraints are unnecessary and should be eliminated.⁶

The issues involved are murky, and will require careful fact-finding by the Commission. What is clearer is that nascent competition has begun to emerge under a regime of limited DBS regulation. What is most clear is that there is no basis today, in either fact or theory, for applying prohibitive or restrictive regulations to DBS relationships with entities other than incumbent CableCos.⁷

⁵ See NRTC at 3-4 (as a direct result of exclusivity arrangements by vertically-integrated [cable] programmers for areas unserved by cable, NRTC is unable to obtain access to critical programming for distribution via DBS). See also Statement of Professor Jerry A. Hausman, attached to DIRECTV, at paras. 25-27.

⁶ See, e.g., Tempo at 8-15. Tempo DBS appears to argue that these restrictions should also apply to other DBS providers, if they must apply to CableCo-affiliated providers. This "competitive parity" argument mistakes the market at issue as DBS vs. DBS providers. In fact, the non-competitive market is the provision of video programming service by any means. In this market, only CableCos have market power and only they could suppress market competition through their DBS relationships. Accordingly, while the merits of applying restrictions to CableCo-affiliated DBS providers can be argued, there simply is no merit to expanding them to MVPDs without CableCo affiliations.

⁷ Prospective cable overbuilders (e.g., Ameritech), like other MVPDs, do not have the market power that should be a prerequisite for such restrictive regulation. It is market power, not transport technology, which should dictate the degree of regulation. In this regard, we disagree with Ameritech that no distinction among MVPDs is warranted (Ameritech 2-4). Similarly, USSB's assertion that Tempo II restrictions should be applied to the RBOCs' video dialtone services (USSB 6) ignores the fact that the RBOCs' not only lack market power, but any market share whatsoever.

B. Agreements Between DBS Providers And Non-Cable Affiliated MVPDs Will Strengthen The Competitive Marketplace

The Commission has dedicated itself to advancing video services competition. In doing so, it has promoted both new technologies and new uses of existing technology. Now, however, it risks impairing effective marketplace competition by overly accentuating intermodal competition. Thus, the proposals “to encourage, to the maximum extent possible, rivalry among MVPDs” (NPRM at para. 54) threaten to isolate competitors into weak single mode approaches. In fact, far from impeding competition, multi-modal marketing relationships between DBS providers and non-CableCo affiliated MVPDs may be necessary to develop effective competition.

Numerous commenters joined NYNEX in pointing out that, while the nature of such relationships was still to be seen, they were clearly pro-competitive.⁸ Perhaps this was stated most clearly by DIRECTV in commenting that:

The Commission also states that it remains committed to the goal of promoting “effective competition to the services provided by cable systems,” and that it has sought to develop the DBS spectrum in precisely this context (NPRM at 36). ...Alliances among emerging MVPDs -- e.g., wireless cable operators, TVRO providers, telephone or long distance companies and/or existing DBS operators or permittees -- could all yield pro-competitive and pro-consumer results in curbing cable’s MVPD market power. The Commission would always have the continuing flexibility to police and impose appropriate safeguards in connection with any particular transaction. At this stage, the Commission should continue to promote all actions that encourage the growth of emerging competition to cable.”⁹

⁸ See, e.g., BellSouth 7-8.

⁹ DIRECTV at 15. See, also, Comments of EchoStar and DirectSat: “applying those restrictions across the board on all DBS operators affiliated with non-dominant MVPDS would be unnecessary and unduly restrictive; it would deprive joint ventures between DBS operators and other MVPDS of the possible efficiencies of an exclusive arrangement even where no anti-competitive dangers loom” (at pp. 55-56).

Absent market power enabling an MVPD to exert undue or improper influence over a DBS provider in the making of such arrangements, marketing agreements that each entity believes is advantageous to its respective competitive position should be supported, not prohibited, by the Commission.¹⁰ Only by this means can the Commission promote stronger competition to incumbent CableCos.

II. NEW “PROGRAM ACCESS” REGULATIONS ARE ONLY NECESSARY FOR HITS-TYPE SERVICES

In the “Program Access” section of NPRM, the Commission sought comment on whether it needed to expand its regulations of DBS operators “to ensure that a DBS operator affiliated with another MVPD, program supplier, or both, does not use exclusive contracts with vertically-integrated program services or other discriminatory conduct to disadvantage its competitors in the provision of retail DBS service, or coerce unaffiliated programmers to deal with that operator on discriminatory terms and conditions” (NPRM at para. 60). The Commission also sought comment on whether it should adopt rules that would require wholesale DBS services provided to cable operators using DBS licenses to also be provided to competing MVPDs on non-discriminatory terms and conditions (NPRM at para. 62).

A. The Program Access Rules Properly Focus On Cableco Market Power

There is extensive conflict among Commenters concerning the need for retaining and enhancing the program access requirements applicable to CableCos and CableCo-affiliated DBS providers. Predictably, the CableCos and affiliated entities argue that existing rules are

¹⁰ Similarly, NYNEX agrees with BellSouth (p. 3, n. 5) and DIRECTV (p. 14) that there is no reasonable basis for treating a marketing agreement freely made between two entities, where neither has the market power to control or unduly influence the other, as an attributable interest akin to equity ownership. The Commission has properly decided not to “attribute” such interests in restricting PCS opportunities, and it should do the same here.

unnecessary to support effective competition, as demonstrated by the growth of DIRECTV and USSB.¹¹ On the other hand, the other entities argue that they have been substantially impeded by CableCo conduct, and that the current rules need strengthening.¹²

NYNEX has no first-hand experience under these rules and cannot yet offer an assessment of their necessity and value. Nevertheless, we are mindful of the potential importance of these rules in controlling CableCo conduct during the development of a competitive marketplace. However, in the context of the Commission's proposals, it is most noteworthy that there is no measurable support for the extension of these requirements to DBS affiliations with other MVPDs (i.e., those without market power) from any of the entities which would "benefit" from such regulation. Indeed, the lone support for the proposed extension of the current rules appears to come from BellSouth which, like NYNEX, has no direct experience to recount.¹³ This legitimate concern is more than counterbalanced by arguments of current competitors that the proposed extension of access rules to others might negate the programming uniqueness these others need to succeed as new market entrants.¹⁴

Accordingly, the Commission should refrain from acting now to extend its current rules. Instead, it should stand ready to review more concrete evidence of anti-competitive conduct.

¹¹ See, e.g., Time Warner Entertainment at 11-15. It is noteworthy that many of these entities rely in argument upon the Primestar Partners consent decrees. However, it is unlikely that even the best efforts of the Commission will result in a competitive market before these decrees expire. Accordingly, they provide no basis for the elimination of close regulatory oversight of cable programming access.

¹² DIRECTV at 20-21; EchoStar and DirectSat at 50-54; NRTC at 5-9.

¹³ BellSouth at 8-9. American Satellite Network offers the alternative of set-aside channels for independent programmers (ASN 8-11). ASN clearly bases its proposal on the ability of CableCos and Cable affiliated DBS providers to constrain independent programmer access, not on the action(s) of non-CableCo MVPDS (ASN 2-5). Others are in a better position than NYNEX to assess the necessity for, and merits of this proposal.

¹⁴ USSB at pp. 9-10.

B. HITS-Type Services Should Be Provided On A Non-Discriminatory Basis To All MVPDs

The Commission has also inquired whether it should require that “wholesale” DBS services provided to CableCos be made available to competing MVPDs on non-discriminatory terms and conditions. An affirmative answer is required. There is great potential for injury to competition in the combination of CableCo market power and DBS control of scarce resources. Indeed, NYNEX believes that DOJ’s analyses show that the use of scarce DBS resources to perform wholesale functions for any MVPD warrants a requirement of open accessibility and non-discriminatory conduct.¹⁵

To begin, Commenters uniformly noted that a HITS-type service will be of great competitive value. Nevertheless, some Commenters argued that regulation of a wholesale function was premature, as the service was not yet established.¹⁶ Other Commenters observed that the value of the service should not be diminished or the service itself prohibited by over-regulation because HITS will facilitate highly-valued, highly-efficient video services which will benefit consumers.¹⁷ We agree, but these comments simply underline the Commission’s own concern that their availability to only certain MVPDS, especially the CableCos, would distort the competitive market.

Several Commenters argue that HITS services are not the provision of wholesale programming, but rather only the provision of authorization and transport services.¹⁸ Although these comments are technically correct, they fundamentally miss the Commission’s true concern;

¹⁵ DOJ at 11-18.

¹⁶ CATA at 4-5.

¹⁷ NCTA at 14-15.

¹⁸ See, e.g., Tempo at 25-27.

that is, that provision of these services by DBS providers for some MVPDs or programmers on a selective basis would gravely disadvantage those excluded.¹⁹ As explained above, this is especially the case where the control and operation of HITS services are combined with the market power wielded by the CableCos. As DOJ notes, because a digital wholesale DBS provider has performed the expensive work of aggregating, digitalizing, compressing, encrypting and transmitting video signals via satellite, its wholesale service may well be the most efficient means to facilitate the provisions of affordable video programming to non-incumbent MVPDs.²⁰ Such a service should be encouraged, but only in a way that ensures its benefits are available on a non-discriminatory basis to all MVPDs and programmers.

Properly understood, the Commission's inquiry should focus (as it does) on whether further regulations are required "to ensure that DBS channels and orbital locations are not used by any entity in a manner that inhibits progress toward a competitive market for the delivery of video programming." (NPRM para. 62). In reply, it is at least doubtful that current regulations would quickly and effectively preclude the anti-competitive conduct envisioned by the Commission. Accordingly, regulation of the type suggested by DOJ is warranted before -- not after -- competitive injury.²¹ Importantly, such regulation should include revisions to

¹⁹ DOJ's detailed market analysis is very instructive as to how the selective provision of DBS HITS-type service could be used anti-competitively (DOJ at 11-18).

²⁰ DOJ at 12.

²¹ NRTC at 8-9. Those who argue that the Commission lacks jurisdiction to achieve this goal cannot thereby avoid the important policy question involved, and the opportunity for Commission action. In fact, whether or not the provision of "wholesale" DBS renders the DBS entity a "satellite cable programming vendor" pursuant to 47 USC § 548 (i)(1) (e.g., Primestar at 17), all MVPDs (including retail DBS providers) are subject to the Commission's jurisdiction. Their conduct and use of DBS resources can be lawfully governed by appropriate regulation.

47 C.F.R. § 76.1301 (c) to include protections for MVPDs, as well as video programmers as DOJ suggests.²²

CONCLUSION

NYNEX supports the goals and concerns expressed in the NPRM as the Commission endeavors to develop a competitive market for the provision of video services. The fair and effective use of DBS resources in establishing this competitive market is essential. Adoption of the positions set forth herein will serve to promote and ensure such use of DBS resources and, most importantly, to ensure progress towards a competitive market where there is effective competition to incumbent CableCos.

Respectfully submitted,

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²² DOJ at 16-17, n. 7.

CERTIFICATE OF SERVICE

I, Yvonne Kuchler, hereby certify that on the 30th day of November 1995, a copy of the foregoing NYNEX Reply Comments in IB Docket No. 95-168/PP Docket No. 93-253 was served on each of the parties listed on the attached Service List by first class U.S. mail, postage prepaid.


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